ble to purchase lands, but goods they are." And it would seem that anciently they could take even lands: Coke Litt. 3 a; Burr's Ex'rs. *vs.* Smith, 7 Vermt. 278. The principal case, therefore, is worthy of special attention, and should its doctrines be generally adopted, it will have divested many cases, under an important branch of law, of doubt and difficulty.

J. T. M.

Supreme Court of the United States.

THE PEOPLE OF THE STATE OF NEW YORK, EX REL. THE BANK OF THE COMMONWEALTH, *vs.* THE COMMISSIONERS OF TAXES OF THE CITY OF NEW YORK.

The legislature of New York, by chap. 240 of the Laws of 1863, provided in substance that banks shall be liable to taxation on a *valuation equal to the amount of their capital stock paid in or secured to be paid in,* deducting the value of real estate. Held, that this tax was in substance a tax upon the property of the bank.

The Bank of The Commonwealth having had a capital actually paid in of $750,000, had invested about one-fourth of it in real estate and the balance in the securities of the United States. Held, that the case was governed by the principles laid down in 2 Black 620, and that so far as the securities of the United States were concerned, the act was unconstitutional and void.

The opinion of the court was delivered by

NELSON, J.—This is a writ of error to the Court of Appeals of the state of New York.

The question involved is, whether or not the stock of the United States, in which the capital of the Bank of The Commonwealth is invested, is liable to taxation by the state of New York under an act passed by its legislature 29th April, 1863, or, to state the question more directly, whether or not that act imposes a tax upon these stocks thus invested in the capital of the bank?

A case between this bank and others, in the city of New York, and the Commissioners of Taxes, came before this court at the December term, 1862, in which it was determined that the capital of the banks invested in the stocks of the United States were not taxable under the state laws. The case is reported in 2 Black R. 620. The act of the legislature under which the tax was then imposed, provided that the capital stock of every company liable to taxation, &c., "shall be *assessed at its actual value* and taxed in the same manner as the other personal and real

estate of the country." It appeared, in that case, that a large portion of the capital of the banks was invested in United States stocks and owned by them, and which had been assessed and taxed by the commissioners. The court, for the reasons stated in the opinion, held that the tax was a tax upon the stock, and which, being exempt from state taxation by the settled law of this court, was illegally imposed.

The statute under which the present case has arisen has been passed since the above decision, and is as follows: "All banks, banking associations, &c., shall be liable to taxation on a *valuation equal to the amount of their capital stock paid in, or secured to be paid in*, and their surplus earnings, &c., in the manner now provided by law," &c.

It will be remembered that the previous act, the act of 1857, directed that the capital stock of the banks should be assessed and taxed *at its actual value*. By the present act, as is seen, the tax is imposed on a *valuation equal to the amount of their capital paid in or secured to be paid in, &c.*

Looking at the two acts, and endeavoring to ascertain the alteration or change in the law from the language used, the intent of the law-makers would seem to be quite plain, namely, a change simply in the mode of ascertaining or fixing the amount of the capital of the banks, which is made the basis of taxation. By the former the *actual value* of the capital, as assessed by the commissioners, is prescribed. By the latter the capital paid in, or secured to be paid in, in the aggregate, is the valuation prescribed. By the former the commissioners were bound to look into the financial condition of the banks, into the investments of their capital, losses and gains, and ascertain the best way they can the sum of present value as the basis of taxation. By the latter they need only look into the condition of the banks in order to ascertain the amount of the capital stock paid in, or secured to be paid in, and this sum, in the aggregate, will constitute the basis.

The rule of the present law is certainly more simple and fixed than that of the former, and much less burthensome to the commissioners or assessors, and in its practical operation is, perhaps, as just. The former mode involved an inquiry into the whole of the financial operations of the bank, its several liabilities and its available resources, often a complicated and difficult undertaking, and, at best, of uncertain results.

In order more fully to comprehend the meaning of the language used in the act of 1863, it may be well to refer, for a moment, to the system of the general banking law of 1838, and the amendments of the same, under which these institutions have been organized.

Any number of persons may associate to establish a bank under this law, but the aggregate amount of capital stock shall not be less than $100,000.

The instrument of association must specify, among other things, the amount of the capital stock of the association and the number of shares into which the same shall be divided. It may also provide for an increase of their capital and of the number of the associates, from time to time, as may be thought proper.

The association is required to deposit with the superintendent of the bank department stocks of the state of New York or of the United States, or bonds and mortgages upon real estate, at a prescribed valuation, before any bills or notes shall be issued to it for circulation as currency. Nor can it commence the business of banking until these securities have been deposited to the amount of $100,000. The public debt and bonds and mortgages are to be held by the superintendent exclusively for the redemption of the bills and notes put in circulation as money until the same are paid. And it is made the duty of the superintendent not to countersign any bills or notes for an association to an amount, in the aggregate, exceeding the public debt or public debt and bonds and mortgages so pledged.

It is true, the associations are not obliged to invest more of their capital paid in in stocks, or stocks and bonds and mortgages, than is required as security, with the superintendent, for the bills and notes delivered for circulation as currency. The investment, however, cannot be for a less amount than $100,000. It may exceed that limit. But this reference to the system shows that however large the amount of the capital of the association, fixed by its articles and paid in, the whole or any part of it may be lawfully invested in these stocks. The whole need not be used as a pledge for the redemption of the bills or notes as currency, as the issuing of these for circulation is only one branch of the business of banking. The banks, therefore, were but obeying the injunction of the law in investing the capital paid in in these stocks.

Now, when the capital of the banks is required or authorized

by the law to be invested in stocks, and among others, in United States stock under their charters, or articles of association, and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together.

The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution. It is the foundation of its credit in the business community.

The legislature well knew the peculiar system under which these institutions were incorporated and the working of it; and when providing for a tax on their capital at a valuation, they could not but have intended a tax upon the property in which the capital had been invested. We have seen that such is the practical effect of the tax, and we think it would be doing injustice to the intelligence of the legislature to hold that such was not their intent in the enactment of the law.

We will add, that we have looked with some care through the statutes of New York relating to the taxation of moneyed corporations, including the act of 1823, in which the first material change was made in the system, the act of 1825, the revision of 1830, the acts of 1857 and of 1863, and it will be seen, in all of them, that the tax is imposed on the property of the institutions, as contradistinguished from a tax upon their privileges or franchises. Since the act of 1825, the capital has been adopted as the basis of taxation, as furnishing the best criterion of the value of the property of which these institutions were possessed. Under their charters or articles of association, this amount was paid in or secured to be paid in by the stockholders or associates, to the corporate body, or ideal person, constituting the capital stock to be managed and disposed of by directors or trustees in furtherance of the objects and purposes for which the institutions were created. It constituted the fund raised by the corporators, with which the institutions began and carried on the particular business in which they were engaged. The injunction of the charters which required this capital to be paid in, made it necessarily

substantial property. The amount might fluctuate according to the good or ill-fortune of the enterprise. It might become enhanced by gains in business, or diminished by losses; but, whether the one or the other, the tax in contemplation of the legislature and of the charters, was imposed on the property of the institution consisting of its capital. In case of a permanent loss, a remedy against grievous taxation was always at hand, by a reduction of the capital.

Having come to the conclusion that the tax on the capital of the Bank of the Commonwealth is a tax on the property of the institution, and which consists of the stocks of the United States, we do not perceive how the case can be distinguished from the cases heretofore before the court, and reported in 2 Black 620.

The judgment of the court below is reversed, and the cause remitted with directions to enter judgment in conformity with this opinion.

We had occasion to review this case when it was before the Court of Appeals in New York, 3 Am. Law Reg. N. S. 535, and to dissent from the position that the tax was valid and not in conflict with the United States Constitution, p. 558. The view then taken coincided with that now enunciated by the Supreme Court of the United States, that the tax is substantially a tax on property. This decision apparently disposes of all evasions by the state legislatures of the principle that the instruments of the U. S. government are not the subject of state taxation. There would seem to be no mode by which a state tax can affect the holder of U. S. securities.

The present case hints at the taxation of a bank franchise as presenting a different class of considerations. It is possible that a legislature may require a bank as a condition of its exercising special privileges, to pay specified sums of money, without reference to the question whether its entire property may be invested in United States securities. Such a tax is not likely to be imposed, and the present decision practically secures to banking institutions, so far as they are holders of United States securities, immunity from state taxation.

T. W. D.

Supreme Court of Illinois.

WILLIAM L. ROSS ET AL. *vs.* ADAM G. INNESS.

Probable cause, as a defence in an action for malicious prosecution, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused was guilty of the offence charged.